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No. 93-1380

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

A.J. ARAVE, WARDEN,
PETITIONER,
-vs-
ALBERT RAY BEAM,
RESPONDENT,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA AND MONTANA AS AMICI CURIÆ IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

This case presents an important question concerning the fair and timely enforcement of presumptively final and valid state court judgments. *Amici* are States which have an interest in finality, the enforcement of their state laws, and the orderly and proper administration of their criminal justice systems.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the United States Supreme Court.

QUESTION PRESENTED[1]

Whether a state court's "fundamental error" review in capital cases constitutes an implicit consideration of all constitutional issues, thereby vitiating any procedural bar to federal habeas review of those issues, regardless whether they were presented to or discussed by the state court.

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1. This brief addresses only the first issue presented by the State of Idaho in its Petition for Writ of Certiorari.

STATEMENT OF FACTS AND PROCEEDINGS

Respondent Beam was convicted and sentenced to death for the murder and rape of a 13-year-old girl. Beam's conviction and sentence were affirmed on review by the Idaho Supreme Court, *State v. Beam*, 710 P.2d 526 (Idaho 1985), and this Court denied Beam's Petition for a Writ of Certiorari. *Beam v. Idaho*, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

After his state conviction became final, Beam filed a petition for writ of habeas corpus in the United States District Court for the District of Idaho. The district court denied Beam's petition, but that ruling was set aside by the Ninth Circuit Court of Appeals. *Beam v. Paskett*, 966 F.2d 1563 (9th Cir. 1992). The Ninth Circuit's decision was vacated by this Court on grounds no longer relevant to the issues presented in the pending petition for writ of certiorari. *Arave v. Beam*, ___ U.S. ___, 113 S. Ct. 1137 (1993).

On remand, the Ninth Circuit again set aside Beam's death sentence on the basis that the trial court improperly considered Beam's prior sexual history in finding the existence of a "continuing threat to society" aggravating factor. *Beam v. Paskett*, 3 F.3d 1301,

1305-07 (9th Cir. 1993). The Ninth Circuit noted that the Idaho Supreme Court did not specifically address the application of the "continuing threat" factor. *Id.* at 1305. Nevertheless, the Ninth Circuit decided to sua sponte address the issue on the basis that it came within the purview of Beam's broad challenge on direct appeal to the constitutionality of Idaho's death penalty statute. *Id.* The Ninth Circuit further ruled that, even if Beam had failed to "fairly present" this issue to the state supreme court, the issue was not procedurally barred in a federal habeas proceeding because Idaho law requires that the Idaho Supreme Court review the entire record in a capital case to determine whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." *Id.* at 1306. The Ninth Circuit found that such a review constitutes an "implicit rejection of claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity." *Id.*

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' decision in this case ignores well-established principles of finality and comity, and obliterates the concept of procedural default in that circuit. The Ninth Circuit's ruling that the Idaho Supreme Court's statutorily required review for error in capital cases constitutes an implicit consideration of constitutional claims—even though those claims have not been raised in or addressed by the state court—is inconsistent with rulings of this Court, and directly conflicts with rulings of other circuit courts of appeal.

The Ninth Circuit's ruling has ramifications far beyond the facts of this case. The Ninth Circuit has in effect abolished procedural default in any case in which a state court has afforded a criminal defendant the added protection of a "fundamental error" review. Under the rationale set forth by the Ninth Circuit, those states that provide such a benefit are deemed to have given up their interest in the finality of their courts' judgments, and are left with uncertainty whether those judgments will ever be enforced. *Amici* urge this

Court to accept review of this case, and to reverse the ruling of the Ninth Circuit Court of Appeals.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS ERRED BY SUA SPONTE RULING THAT A STATE COURT'S REVIEW FOR "FUNDAMENTAL ERROR" CONSTITUTES AN IMPLICIT CONSIDERATION OF ALL CONSTITUTIONAL ISSUES. THAT RULING CONFLICTS WITH OPINIONS FROM THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, AND OBLITERATES THE CONCEPT OF PROCEDURAL DEFAULT IN THE NINTH CIRCUIT.

A. *The issue whether the trial court improperly considered Beam's prior sexual history was never "fairly presented" to the Idaho state courts on direct appeal.*

Before the federal courts may consider a state prisoner's application for relief under 28 U.S.C. § 2254, the prisoner must have exhausted his state court remedies for every claim raised in the petition. *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2554-55, 115 L. Ed. 2d 640 (1991); *Castille v. Peoples*, 489 U.S. 346, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). To properly exhaust state court remedies, the prisoner must have afforded the state's highest court the opportunity to rule upon the

merits of his federal constitutional claim by "fairly presenting" the claim to the state's highest court in a procedurally appropriate manner. *Castille*, 489 U.S. at 351. A claim is fairly presented if the prisoner has described the operative facts and legal theories on which his claim is based. *Picard v. O'Connor*, 404 U.S. 270, 277-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). The prisoner need not cite "chapter and verse" of the federal constitution, but the prisoner must fairly present the "substance" of the federal claim to the state courts. *Id.* at 278. It is not enough that all the facts necessary to support the claim were before the state courts or that a somewhat similar state law claim was made. *Anderson v. Harless*, 459 U.S. 4, 6, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982).

In the present case, Beam did not "fairly present" to the Idaho state courts the "operative facts" and "legal theories" underlying the claim in question. On direct appeal to the Idaho Supreme Court, Beam argued that Idaho's sentencing statute is unconstitutional because (1) the imposition of the death sentence is made by a judge rather than a jury, and (2) uneven imposition of the death penalty occurs based on the age of the defendant and the age and sex of the

victim. *State v. Beam*, 710 P.2d 526, 529–30 (Idaho 1985). Beam apparently did not mention anything about the trial court's discussion of his sexual history, and the opinion from the Idaho Supreme Court does not reference that issue. *Id.*

Beam's federal habeas petition was similarly devoid of any reference to the trial court's discussion of Beam's sexual history, and the federal district court denied his petition without addressing such a claim. *Beam v. Paskett*, 744 F. Supp. 958, 962–63 (D. Idaho 1990). Nevertheless, the Ninth Circuit sua sponte ruled that the trial judge's "arbitrary pre-conceived attitudes" about sexual conduct were employed to "enforc[e] societal norms regarding sexual activity." *Beam v. Paskett*, 3 F.3d at 1308–09.

The Ninth Circuit cited *Smith v. Digmon*, 434 U.S. 332, 333, 98 S. Ct. 597, 598, 54 L. Ed. 2d 582 (1978), as justification for its decision to address the issue in question. In *Smith*, however, the Alabama Court of Criminal Appeals denied the defendant's direct appeal without specifically referring to one of the claims the defendant had raised in his opening brief. After the Fifth Circuit Court of Appeals denied the defendant's habeas petition on

procedural grounds, this Court reversed, noting that both the defendant and the State of Alabama had briefed the issue on direct appeal. This Court ruled that "whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." 434 U.S. at 333.

In the present case, the issue in question was not briefed by the parties on direct appeal. Thus, unlike the state court in *Smith*, the Idaho Supreme Court did not "choose to ignore" a federal constitutional claim squarely raised on direct appeal, and *Smith* is inapposite.

By reaching the merits of an issue not raised by the parties, the Ninth Circuit in effect engaged in a "plain error" review. Such a review is improper on collateral review, and violates the states' strong interest in the finality of judgments. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *see also Engle v. Isaac*, 456 U.S. 107, 134-35 (1982); *United States v. Frady*, 456 U.S. 152, 165-66 (1982).

The power of a state to pass laws means little if the state cannot enforce them. *McClesky v. Zant*, 111 S. Ct. 1454, 1469 (1991). Moreover, the extreme delay attendant to federal habeas review makes any resentencing of a state prisoner very difficult, if not impossible. *Henderson*, 431 U.S. at 154 n.13. Because the reversal of a state prisoner's conviction or sentence on collateral review has such serious consequences, a federal court must apply a standard of error higher than mere "plain error." *Id.* Accordingly, the Ninth Circuit Court of Appeals erred by sua sponte addressing an issue not raised by the parties.

B. *The Ninth Circuit Court of Appeals' ruling that unstated constitutional questions are implicitly considered as part of Idaho's death penalty review effectively abolishes the concept of procedural default, and directly conflicts with rulings of other circuit courts of appeal.*

If a prisoner has procedurally defaulted on a state court claim, federal courts should not consider the claim unless (1) the prisoner can demonstrate that the state does not strictly or regularly apply its procedural bar rule, *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987 (1988); or (2) the prisoner demonstrates cause for the default and actual prejudice as a result of the alleged violation of

federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice, *Coleman v. Thompson*, 111 S. Ct. at 2565. In Idaho, a litigant who fails to raise an issue on direct appeal waives his right to do so. Idaho Code § 19-2719(5), (10); *State v. Burris*, 619 P.2d 1136, 1137 (Idaho 1980). The State of Idaho strictly applies its procedural bar rule. *Id.* at 1137. Accordingly, notwithstanding the Idaho Supreme Court's statutorily required review for sentencing errors, the federal courts should not have considered Beam's procedurally barred claim absent a showing of cause and prejudice, or a showing that a fundamental miscarriage of justice would result from the denial of his claim. Such a showing was not made, and the Ninth Circuit erred by addressing the merits of Beam's procedurally defaulted claim.

The Ninth Circuit's ruling is inconsistent with this Court's ruling in *Coleman v. Thompson*. In *Coleman*, the defendant missed the 30-day deadline for filing a notice of appeal by three days, and the Commonwealth of Virginia moved to dismiss the appeal. After both parties filed several briefs on the subject of the dismissal

motion and on the merits of Coleman's claims, the Virginia Supreme Court granted the motion to dismiss "upon consideration [o]f" the filed papers. Coleman filed a habeas petition in federal court, and both the district court and the Fourth Circuit Court of Appeals denied the petition based on procedural default. This Court affirmed the Fourth Circuit's ruling, finding that the Virginia Supreme Court had relied on an independent state procedural rule in denying Coleman's appeal. 111 S. Ct. at 2560.

In light of *Coleman*, int the present case, the Ninth Circuit should not have addressed the merits of the issue in question, particularly since the issue was *never* presented to or addressed by the Idaho Supreme Court.

In deciding to reach the merits of a procedurally defaulted claim, the Ninth Circuit Court of Appeals misinterpreted this Court's ruling in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In *Ake*, this Court excused—on direct appeal from the Oklahoma Supreme Court—the defendant's procedural default because "the State had made application of the

procedural bar depend on an antecedent ruling on federal law."[2] 470 U.S. at 75. At trial, Ake requested a psychiatric evaluation at state expense to determine his mental state at the time of the offense. *Id.* at 72. The trial court rejected his request, and he was unable to present testimony to support his sole defense—insanity. *Id.* Ake filed a motion for new trial, but did not repeat his request for a psychiatrist in that motion. After the motion was denied, Ake filed a direct appeal with the Oklahoma Court of Criminal Appeals, arguing, among other things, that he should have been provided the services of a court-appointed psychiatrist. *Id.* at 73. The Oklahoma Court of Criminal Appeals rejected his argument on the merits, then also ruled that Ake had waived the claim by not raising it in his motion for a new trial. *Id.* at 74.

On direct appeal to this Court, this Court reversed, ruling that, because under Oklahoma law federal constitutional errors cannot be waived, the Oklahoma court had necessarily addressed the merits of the federal constitutional claim before applying a procedural bar.

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2. Under Oklahoma law, federal constitutional claims cannot be waived. *Ake*, 470 U.S. at 74–75.

Thus, this Court ruled that Oklahoma had made the application of the procedural bar dependent on an antecedent ruling on federal law, and the issue was preserved for consideration on direct appeal. *Id.* at 74–75.

Unlike *Ake*, the present case is not a "direct appeal." Moreover, unlike *Ake*, in the present case, the claim at issue was *never* presented to the state appellate court, and was not considered by that court as part of its statutorily required review for error. Beam's procedural default did not involve an "antecedent ruling on federal law;" thus, *Ake* is inapposite.

In *Coleman v. Thompson*, this Court noted that *Ake* was a direct review case, and has never been applied in federal habeas cases. 111 S. Ct. at 2560. The Ninth Circuit erred by applying it in the present case, and this Court should accept review of this case to correct that error.

Under the rationale suggested by the Ninth Circuit Court of Appeals, procedural default no longer exists in Idaho for any capital case. Because the Idaho Supreme Court has an affirmative duty to review the entire record in a capital case for errors in sentencing, a

defendant in such a case will never be found to have procedurally defaulted on any imaginable sentencing issue, even though the defendant has not raised the issue at trial or on direct appeal. Such a result is inconsistent with this Court's ruling in *Coleman v. Thompson*, and should be rejected.

The Ninth Circuit's ruling in this case is significant not only in Idaho, but in other states in which the state appellate courts engage in any type of "fundamental error" analysis as part of its appellate process. In Arizona, for example, the state appellate courts engage in a "fundamental error" analysis in *every* criminal case. A.R.S. § 13-4035. Thus, under the reasoning employed by the Ninth Circuit in the present case, procedural default no longer exists in Arizona for any federal constitutional claims regardless of whether a criminal defendant raises the claim at trial or on direct appeal.

The Ninth Circuit's approach in this case directly contradicts the approach taken by three other circuit courts of appeal. In *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), the Eleventh Circuit rejected an argument similar to that advanced by the Ninth Circuit. In *Julius*, the defendant, who was under a sentence of death, filed a

habeas petition raising several claims that had not been raised at trial or on direct appeal to the Alabama appellate courts. The defendant noted that "Alabama courts are under a duty in capital cases to notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has adversely affected a substantial right of the appellant." *Id.* at 1546. The defendant then argued that, because the Alabama Court of Criminal Appeals and the Alabama Supreme Court stated that they had searched the record for prejudicial errors and had found none, those courts had implicitly reached the merits of his claims. *Id.* The United States District Court for the Middle District of Alabama denied the defendant's habeas petition, and the Eleventh Circuit affirmed that ruling. After noting that the adoption of the defendant's position "would preclude a finding of procedural default in virtually every Alabama capital case," the Eleventh Circuit ruled that "the mere existence of a 'plain error' rule does not preclude a finding of procedural default." *Id.*

In *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), the First Circuit similarly rejected an "implicit consideration" argument. In *Puleio*, the defendant failed at trial to challenge a jury instruction defining malice aforethought. Because Massachusetts law provides that, notwithstanding procedural default, an appellate court may reach the merits of an issue to determine whether a miscarriage of justice likely occurred, the Massachusetts Supreme Judicial Court engaged in a "harmless error" analysis. *Id.* at 1200. Notwithstanding the Massachusetts court's harmless error analysis, the First Circuit ruled that the defendant had procedurally defaulted on his jury instruction claim. The court found that state court "review under the discretionary state miscarriage of justice standard will not suffice, in and of itself, to bypass the Commonwealth's contemporaneous objection rule." *Id.*

Finally, in *Hayes v. Lockhart*, 766 F.2d 1247 (8th Cir. 1985), the Eighth Circuit rejected the same type of "implicit consideration" argument. In *Hayes*, the defendant failed to object to what he later claimed was a defective jury instruction. The Arkansas Supreme Court declined to reach the merits of the claim, but ruled—as part

of a "plain error" analysis—that the instruction was not prejudicial. The defendant filed a habeas petition, which was denied by the federal district court. The Eighth Circuit affirmed the district court's ruling, rejecting the defendant's argument that, because the Arkansas Supreme Court rejected the claim as part of a "plain error" analysis, the defendant was somehow entitled to an independent federal court determination of this issue. *Id.* at 1252.

Amici urge this Court to accept review of this case to resolve the conflict between the Ninth Circuit and the Eleventh, First, and Eighth Circuits. The fact that a state appellate court extends to a criminal defendant the additional benefit of a discretionary review for fundamental error should not result in the obliteration of the rules governing waiver and preclusion. The approach taken by the Eleventh, First, and Eighth Circuit Courts of Appeal recognizes this principle, and should be adopted by this Court.

CONCLUSION

The Ninth Circuit Court of Appeals erred by sua sponte reaching an issue that was never presented to the Idaho appellate courts, and by ruling that the Idaho Supreme Court's statutorily required review for error in capital cases constitutes an implicit consideration of all constitutional claims. This ruling obliterates procedural default in those states that engage in any type of "fundamental error" review as part of the criminal appellate process. Such a result is inconsistent with decisions of this court, and directly conflicts with decisions of other circuit courts of appeals. Accordingly, this Court should accept review of this case, and reverse the ruling of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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